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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-896

KARL R. HUBER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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December 10, 1979

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No.

KARL R. HUBER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Petitioner, Karl R. Huber, prays that a Writ of Certiorari issue to review the judgment entered on October 10, 1979, by the United States Court of Appeals for the Second Circuit, denying a petition for rehearing containing a suggestion for rehearing *en banc,* following an original decision and order of the United States Court of Appeals for the Second Circuit on July 20, 1979, affirming Petitioner's convictions for federal criminal offenses in proceedings entitled *United States of America,* Appellee, vs. *Karl R. Huber,* Appellant, Docket No. 79-1132.

Opinion Below

The Opinion of the United States Court of Appeals for the Second Circuit affirming Petitioner's convictions is reported at 603 F.2d 387, and reproduced in the Appendix

at page 1a. The Orders of the United States Court of Appeals for the Second Circuit denying rehearing and rehearing *en banc* are reproduced in the Appendix beginning at page 29a.

Jurisdiction

The judgment of the Court of Appeals was entered on July 20, 1979. A petition for rehearing containing a suggestion for rehearing *en banc* was denied October 10, 1979. This Court extended the time within which to file Petitioner's petition for a writ of certiorari to and including December 10, 1979. The jurisdiction of this Court is invoked under Title 28, United States Code, § 1254(1).

Questions Presented

1. May a defendant be convicted and his interest in seven business corporations and subsidiary legal entities forfeited under the racketeer influenced and corrupt organization (RICO) statute, 18 U.S.C. §§ 1961 *et seq.*, where the trial court's charge to the jury authorized it to conclude that all seven entities constituted a single enterprise and were subject to forfeiture if the jury found that the defendant merely owned them all, without regard to whether the affairs of each of the entities were conducted "through a pattern of racketeering activity," so long as the affairs of at least one of the seven entities were so conducted?

2. Is an indictment purporting to allege a single violation of the RICO statute duplicitous where the enterprise alleged consists of seven different business organizations, and the evidence fails to establish the existence of any single set of activities or affairs common to all of the members of the group?

3. Is the evidence sufficient to sustain a conviction under the RICO statute, and the forfeiture of parent or holding corporate entities where the evidence shows only that the affairs of subsidiary corporations were operated through a "pattern of racketeering activity"?

4. May the reiteration of the same false statement on more than one occasion be used to justify multiple violations of § 1001 of Title 18, United States Code, and the imposition of cumulative punishment?

Statutory Provisions

Title 18, United States Code, Section 1001

§ 1001. Statements or entries generally

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Title 18, United States Code, Section 1961(4)

§ 1961. Definitions

As used in this chapter—

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and union or group of individuals associated in fact although not a legal entity;

Title 18, United States Code, Section 1962(c)

§ 1962. Prohibited activities

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

Title 18, United States Code, Section 1963(a)

§ 1963. Criminal penalties

(a) Whoever violates any provision of § 1962 of this chapter shall be fined not more than $25,000 or imprisoned not more than 20 years, or both, and shall forfeit to the United States (1) any interest he has acquired or maintained in violation of § 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of § 1962.

Statement of the Case

The Petitioner, Karl R. Huber, was convicted in the United States District Court for the Southern District of New York of one count of conspiracy, in violation of Title 18, United States Code, Section 371, 19 counts of having caused the making of false statements, in violation of Title 18, United States Code, Sections 1001 and 2, eight counts of mail fraud, in violation of Title 18, United States Code, Section 1341, one count of perjury before a grand jury in violation of Title 18, United States Code, Section 1623, and one count of having participated in the affairs of an enterprise through a pattern of racketeering activity, in violation of Title 18, United States Code,

Section 1962(c).* On March 20, 1979, Petitioner was sentenced to concurrent terms of three years of imprisonment on the conspiracy and false statement counts, and concurrent two years terms of imprisonment on the mail fraud counts, such periods of incarceration to run concurrently with the sentences imposed for conspiracy and false statements, and to a period of one year of incarceration on the perjury count, to run consecutively to the sentences imposed on the remaining counts. In addition, the Court imposed cumulative fines of $5,000 each on the conspiracy and false statement counts and $1,000 each on the mail fraud counts, for a total of $108,000. The Court further directed the forfeiture of all of the defendant's right and interest in the seven business organizations identified in the racketeering count, and directed that the Attorney General of the United States seize all property or interests of the defendant in those entities subject, however, to the defendant's right to redeem and repossess himself of such property and property rights upon his payment to the Attorney General of cash or property satisfactory to the Attorney General having the value of $100,000, pursuant to 18 U.S.C. §§ 1963(a) and (b). In addition, the costs of prosecution were charged to the defendant.

Statement of Facts

1. *The structure of State and Federal funding programs:* Under a variety of different State and Federal programs, during the 1970's, funds were made available

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* Prior to the empaneling of the petit jury, the government moved to dismiss four counts charging the defendant with violating 18 U.S.C. § 1001 and one count of mail fraud. Prior to submission of the case to the jury, the District Court granted the defendant's motion, pursuant to Rule 29 of the Federal Rules of Criminal Procedure, for a judgment of acquittal on all six counts of the indictment which had alleged the defendant with having transported stolen money across state lines in violation of 18 U.S.C. § 2314.

to eligible hospitals, nursing homes, and other health-related institutions to constsruct and furnish new facilities and renovate or rehabilitate old ones. Federal funds for these purposes were made available under the auspices of the Department of Health, Education and Welfare through the Hill-Burton program. (Tr. 87-89)* In the State of New York, similar funds are provided by the State Department of Health under financing arrangements set forth in Articles 28A and 28B of the New York State Public Health Law. (Tr. 113-115) Each of the hospitals named in the indictment, Alexian Brothers Hospital, Columbus Hospital, Greater Paterson General Hospital, Long Island College Hospital, Point Pleasant Hospital, Saint Clare's Hospital, and Wyckoff Heights Hospital, availed themselves of the benefits of these programs in order to obtain funding for construction, reconstruction and modernization projects between 1971 and 1973. (Tr. 89; 115; 414; 595; 755)

In addition to receiving funds through various grant and loan programs, each of the seven hospitals identified in the indictment was eligible for Medicare and Medicaid reimbursement for certain costs and expenses related to the treatment of patients eligible to received Medicare and Medicaid benefits. (Tr. 53; 712; 755; 773) Among the costs and expenses thus reimbursed was the depreciation on capital assets used in the care and treatment of eligible individuals. (Tr. 681) At the conclusion of each year, each of the hospitals submitted a "Cost Report" setting forth, among other things, an amount of depreciation on capital assets which, in turn, was derived as a function of the historical cost of the asset divided by its useful life. (Tr. 56; 175-76; 446; 618) These cost reports were submitted to various insurance companies under the contract with the Department of Health, Education and Welfare to act as intermediaries between the hospital providers and

* Parenthetical numerical references are to pages of the trial transcript.

the Department of Health, Education and Welfare. On the basis of the cost reports, these insurance companies or "fiscal intermediaries" determined the prorated amount of per diem reimbursement to be received by each hospital in the next following fiscal year. (Tr. 68-72; 176-31; 711-23, 755-60)

2. *The medical companies:* Hospital Equipment Company (HEC) was engaged in the business, primarily, of selling soft goods and disposable supplies to hospitals, nursing homes, and other health related facilities. (Tr. 940) A division of the company, to become known as "Medical Facilities," was engaged in the business of planning, designing, and equipping the interiors of newly constructed or renovated hospitals and nursing homes. (Tr. 1073-75) Medical Facilities provided a complete package of services. Its staff designers planned entire interior hospital layouts including the selection of wall coverings, carpeting, draperies, and other fixtures, and it sold all of the furniture items necessary to completely furnish and equip hospitals and nursing homes, with the exception of major medical machinery, such as X-ray equipment, and other sophisticated diagnostic hardware. (Tr. 1080-84)

Between 1971 and 1972, HEC entered into contract agreements with the hospitals identified in the indictment, according to which HEC was to provide complete planning and design services to the hospitals and was to sell to them furniture and equipment for patient rooms, offices, common areas, and the like. Under the terms of these contracts or "letter agreements," the hospital was to be charged a price equal to the company's cost of acquiring furniture, fixtures, and equipment plus a percentage of cost ranging between 5 and 8 percent. In addition, freight charges actually incurred by the company were to be passed on to the hospitals. (Tr. 152; 252-3; 412-14; 599-600; 671-72)

In 1973, the business of Medical Facilities Division of HEC was taken over by Debs Hospital Supplies, Inc., a

Chicago-based business engaged in essentially the same activities as HEC. (Tr. 3025; 4817) Later, this business was conducted by a corporation created out of the former Medical Facilities Division of Debs Hospital Supplies, Inc. (Debs) and a subsidiary of Debs known as Hospital Furniture, Inc. The new corporation was known as Hospital Furniture/Medical Facilities, Inc. (Tr. 2498-2500)

3. *The scheme to defraud:* Although the terms of the letter agreements required that furniture and equipment be sold by HEC or a successor company to the hospitals at the company's cost plus a stated percentage of between five and eight per cent, the hospitals were in fact charged a price substantially in excess of that which would have been arrived at if calculated according to this formula. Actual manufacturers' invoiced prices to the company were inflated by approximately 20 to 30 per cent, and the contract formula of five to eight per cent was then added on to this inflated price, the entire cost being passed on to the hospitals. In addition, freight charges not actually incurred by the company, known as free freight or phantom freight, were billed to the hospitals. (Tr. 1176; 2591-92; 2606-07)

4. *The conspiracy:* Peter Conroy and Anthony Eckert were the principal salesmen for the Medical Facilities Division of HEC, and one or the other or both of them signed or negotiated all of the "cost plus" agreements with the six* hospitals named in the indictment. Conroy and Eckert each received commissions equal to approximately 30 per cent of the gross profit earned on each contract, and each of them acknowledged, at trial, that it was not his intention to carry out the contracts with the indictment hospitals according to their terms, but rather, to engage in a systematic course of conduct designed to artificially inflate costs and thus increase the profit to be made on each contract. (Tr. 1179; 3242; 3655; 3681-84) In addition, Con-

* Counts relating to one of the original seven hospitals named were dismissed prior to the empaneling of the petit jury.

roy and Eckert received commissions equal to 50 per cent of the non-existent freight charges, or phantom freight, charged to the hospitals. (Tr. 3244; 3634)

Petitioner, Karl R. Huber, and his father, Karl Huber,* were officers and principals of HEC and Debs, and owned these entities indirectly through their control of other corporations. Prior to November 1, 1971, HEC had been a division of Esterline Corp., a large publicly held corporation. (Tr. 887-89) On November 1, 1971, Tudor, Inc., an investment holding company wholly controlled by the Huber family, acquired all of the outstanding stock of HEC. (Tr. 4006-08) Viewed in the light most favorable to the Government, the evidence showed that Petitioner became aware of the disparity between the actual 20 to 30 per cent gross profit margin earned by HEC on its contracts with various hospitals and the contract formulations which called for gross profit margins on the order of five to eight per cent shortly after Tudor's acquisition of HEC. The evidence further showed that Karl R. Huber and Karl Huber involved themselves in the business affairs of HEC, and that both were familiar with the day to day operations of the company. (Tr. 1050-54; 1573) The dual signatures of Karl Huber and Karl R. Huber were required in order to disburse funds out of the company's principal checking account.

The evidence further showed, viewed in the light most favorable to the Government, that Petitioner encouraged the inflation of invoiced prices and the charging of falsified amounts for freight, and that Petitioner's father, co-defendant Karl Huber, invented the term "phantom freight." (Tr. 3148-49; 3628) The principal area of activity of Karl R. Huber, however, was in the raising of

* Karl Huber was indicted as a co-defendant, but because of his advanced age and failing health, the case against him was severed for separate trial.

sufficient capital to permit the company to do business and in the financing of its accounts receivable. (Tr. 1877)

By the end of its first fiscal year under Tudor (October, 1972), HEC had lost in excess of $400,000. (Tr. 1438-41; 1562) In January, 1973, Tudor, Inc., acquired Debs Hospital Supplies, Inc., a Chicago-based business engaged in the same kinds of activities as HEC. (Tr. 4802-04) Debs had a subsidiary known as Hospital Furniture, Inc., which was engaged in the same business as the Medical Facilities Division of HEC. Because of the serious financial difficulties which were encountered at HEC, the business of Medical Facilities Division of HEC was transferred to Debs in February, 1973, and virtually all of the invoices submitted to the hospitals named in the indictment were done under the auspices of Debs. (Tr. 2491) In December, 1973, Medical Facilities was combined with the Hospital Furniture subsidiary of Debs and a new corporation, Hospital Furniture/Medical Facilities was formed. (Tr. 5324)

5. *The "Enterprise":* The "enterprise" alleged in that count of the indictment charging the defendant with having participated in the affairs of an enterprise through a pattern of racketeering activitiy in violation of 18 U.S.C. § 1962(c), consisted of seven business organizations: Hospital Equipment Company, Debs Hospital Supplies, Inc., Medical Facilities, Hospital Furniture/Medical Facilities, Inc., Atlantic Medical Corporation, Tudor, Inc., and Boden, Inc. The first four of these entities, HEC, Debs, Medical Facilities, and Hospital Furniture/Medical Facilities, Inc., were the "front line" medical companies actually engaged in doing business with the hospitals identified in the indictment. As previously set forth, Medical Facilities was a division of HEC whose activities were transferred, in 1973, to Debs. The business activities of Medical Facilities and Hospital Furniture, Inc., already a subsidiary of Debs at the time of its acquisition by Tudor, Inc., were combined to form a single entity, Hospital Furniture/Medical Facilities, Inc. (Tr. 2498-2500; 5324)

Tudor, Inc., was an investment holding company having interests in real estate, securities portfolios, minority interests in various small enterprises, and other related activities. (Tr. 2482; 5148) On November 1, 1971, it acquired all of the outstanding shares of HEC. (Tr. 5298-99) Other than guaranteeing certain trade debt and other obligations of HEC, Tudor had no connection or association of any kind with the front line medical companies nor, for that matter, was it in any way associated or connected with the fraudulent activities which formed the core of the government's case.*

Atlantic Medical Corporation was a public shell corporation in which Tudor, Inc., held a majority interest. (Tr. 2481; 5299) Following its acquisition by Tudor, HEC was organized as a subsidiary of Atlantic. (Tr. 5305) Later, following Tudor's acquisition of Debs, in January, 1973, Tudor exchanged its shares in Debs for Atlantic's shares of HEC, leaving the result that Debs became a subsidiary of Atlantic. (Tr. 2491) Other than its purely passive ownership capacity, Atlantic had no connection with the facts of the case. (Tr. 2495; 5298-99)

Boden, Inc., was an investment holding company created in April, 1975, and, as was the case with Tudor, it was wholly owned and controlled by the Huber family. (Tr. 4978; 5388) Shortly after its creation, Boden obtained all of the assets of Tudor, Inc., subject to Tudor's outstanding liabilities. In addition, Boden owned or controlled

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* The government established that some $871,000 flowed from HEC to Independent Management Company (IMC), which operated under Tudor in the management of real properties owned by the Hubers. (Tr. 1547) HEC lent IMC $300,000 and made payments to IMC for rent and leasehold improvements as well. (Tr. 2048-49; 4945) In turn, consideration in the form of debt assumption and otherwise flowed from IMC to HEC, such that, by 1973, the inter-company balance was approximately $1200. None of the $871,000 was ill-gotten pelf from the hospitals named in the indictment, however. (Tr. 5474)

investments in real estate, securities portfolios, and other similar assets. Other than as a successor to Tudor, Inc., Boden, like Tudor and Atlantic, had no connection or association with the activities alleged in the indictment. (Tr. 2474-78; 4878-83)

Reasons for Granting the Writ

The decision below raises critical issues concerning the ambit of a portion of the Organized Crime Control Act of 1970, specifically, the Racketeer Influenced and Corrupt Organizations law ("RICO"), 18 U.S.C. §§ 1961 *et seq.*, and thus issues of critical importance both to the fair and uniform administration of federal criminal justice.

Enacted by Congress in 1970, the RICO statute has provoked substantial interpretive litigation centering upon the scope of its coverage and the meaning and application of its various terms. While there has been general unanimity respecting the facial constitutionality of the statute in the circuits, *see, e.g., United States* v. *Parness,* 503 F.2d 430 (2d Cir. 1974), *cert. denied,* 419 U.S. 1105 (1975); *United States* v. *Campanale,* 518 F.2d 352 (9th Cir. 1975), *cert. denied sub nom., Matthews* v. *United States,* 423 U.S. 1050 (1976), judicial consensus begins and ends there. In the analysis and application of its most basic concepts, there has been nothing less than conflict, inconsistency and contradiction. *Compare, e.g., United States* v. *Stofsky,* 409 F.Supp. 609 (S.D.N.Y. 1973), *aff'd on other grounds,* 527 F.2d 237 (2d Cir. 1975), *cert. denied,* 429 U.S. 819 (1976), and *United States* v. *Scalzitti,* 408 F.Supp. 1014 (W.D.Pa. 1975), *appeal dismissed,* 556 F.2d 569 (3rd Cir. 1977) ("pattern of racketeering activity" requires that the two or more predicate offenses be related to each other) *with United States* v. *Elliott,* 571 F.2d 880 (5th Cir. 1978), *cert. denied sub nom., Delph* v. *United States,* 439 U.S. 953 (1978) (predicate offenses

need not be related to each other to constitute a "pattern of racketeering activity); *United States* v. *Brown,* 555 F.2d 407 (5th Cir. 1977), *cert. denied,* 435 U.S. 904 (1978) ("enterprise" includes public entities) *with United States* v. *Mandel,* 415 F.Supp. 997 (D.Md. 1976), *aff'd on other grounds,* 591 F.2d 1347 (4th Cir. 1979) (governmental bodies not within the meaning of "enterprise"); *United States* v. *Altese,* 542 F.2d 104 (2d Cir. 1976), *cert. denied sub nom., Napoli* v. *United States,* 429 U.S. 1039 (1977) ("enterprise" may be legitimate or illegitimate activity) *with United States* v. *Sutton,* 605 F.2d 260 (6th Cir. 1979) ("enterprise" refers only to legitimate business organizations and undertakings); *United States* v. *Parness, supra,* and *United States* v. *Altese, supra* (statute is to be liberally construed in criminal cases) *with United States* v. *Mandel,* 415 F.Supp 997, *supra* (liberal construction limited to civil remedial provisions of RICO and does not extend to its punitive provisions; latter to be construed in favor of lenity); *United States* v. *Nerone,* 563 F.2d 836 (7th Cir. 1977), *cert. denied,* 435 U.S. 951 (1978) (substantial nexus between racketeering activity and affairs of the "enterprise" must be established to sustain guilt) *with United States* v. *Stofsky,* 409 F.Supp. 609 *supra* (conviction requires only that predicate acts be committed in the course of association with the "enterprise" so long as the acts of racketeering are themselves interrelated) *and United States* v. *Rubin,* 559 F.2d 975 (5th Cir. 1977), *vacated and remanded,* 439 U.S. 810 (1978) (inclining toward *Nerone,* but not resolving the issue).

Indeed, even the relative lucidity of the expression of legislative intent in the language of the statute has been the subject of diametrically opposed comment in the cases. *Compare, e.g., United States* v. *McMonagale,* 437 F.Supp. 721 (E.D.Pa. 1977) (". . .the clear language of 18 U.S.C.

§ 1962(c)) . . .") *with United States* v. *Rubin, supra,* ("the language of § 1962(c) is less than pellucid . . .").

Despite the existence of this dazzling array of sharply conflicting viewpoints in the Circuits, this Court has not yet availed itself of an opportunity to address and definitively resolve any of the host of issues arising under RICO. The urgency of the need for this Court to do so is, in the context of this case, brought into sharp focus. For in addition to questions going to the scope of substantive liability under the statute, the present case involves issues of the extent to which the criminal forfeiture feature of RICO—unknown to American law for nearly two centuries—may be applied to parent or holding corporations by virtue of their controlling interest in subsidiary entities whose affairs are corrupted by acts of racketeering.

For the most part, prosecutions under the RICO statute to date have involved labor unions, *see, e.g., United States* v. *Rubin; supra,* public entities, *e.g., United States* v. *Brown, supra; United States* v. *Mandel, supra;* and groups of natural persons united in common cause through their conduct of unlawful gambling businesses, *e.g., United States* v. *Altese, supra; United States* v. *Hawes,* 529 F. 2d 472 (5th Cir. 1976); or for the common purpose of committing arson, murder, obstruction of justice, and other assorted forms of more or less syndicated mayhem, *United States* v. *Elliott, supra.*

In such cases, the criminal forfeiture sanction of RICO (18 U.S.C. § 1963) is either not meaningfully enforceable because there *is* no legitimate interest to forfeit, or results in the forfeiture of one's position in the organization, a consequence already compelled by the statute, in the case of labor unions (29 U.S.C. § 504), and usually by local law, in the cases of persons convicted of participating in political entities through acts of racketeering.

Only rarely have the cases involved legitimate business enterprises, and even in these rare instances, the enterprise itself is generally a simply constituted business corporation or unincorporated proprietorship. *See, e.g., United States* v. *Nerone,* 563 F.2d 836 (7th Cir. 1977) *cert. denied,* 435 U.S. 951 (1978), *United States* v. *Mandel, supra, United States* v. *Weatherspoon,* 581 F.2d 595 (7th Cir. 1978), *United States* v. *Swiderski,* 593 F.2d 1246 (D.C. Cir. 1978), *cert. denied sub nom., McGowan* v. *United States,* —— U.S. ——, 99 S.Ct. 2055-56 (April 30, 1979).

But the present case represents one of a growing trend of cases in which *more* than one legitimate enterprise is exposed to forfeiture as a result of a single prosecution under RICO. *See, United States* v. *Thevis,* —— F.Supp. —— (S.D.Ga. 1979); *United States* v. *Marubeni America Corp.,* No. Cr 78-1060 (C.D.Cal. 1978).

Here, as in those cases, the relevant "enterprise" consists of a group or cluster of corporate and quasi-corporate bodies indisputably related to each other, by ties of common ownership and ownership *inter se,* but not by any common activity, project, or set of "affairs" in which the defendant participated through a pattern of racketeering activity. Here, rather, by a process of perverse transitivity, the involvement of the affairs of subsidiary entities in racketeering activity has resulted in the forfeiture of all of the Petitioner's interest in parent or holding organizations solely by virtue of the status of those corporate bodies *vis a vis* their subsidiaries and their ownership in common by the defendant. The sheer magnitude of the interests exposed to forfeiture in this and other pending cases compounds the already urgent need for this Court to exercise its discretion in favor of hearing and finally disposing of the issues presented.

In addition, the instant case also presents important issues regarding the construction and application of 18

U.S.C. § 1001. Petitioner's conviction below on nearly a score of false statement counts and the imposition of cumulative punishment is totally inconsistent with the position of this Court that liabiliy may not be multiplied and punishment may not be cumulated for a single act absent a clear expression of congressional purpose to the contrary.

For these reasons, as more fully enunciated in the body of this petition, this Court should issue a writ of certiorari to the United States Court of Appeals for the Second Circuit in this matter and set the case down for briefing and argument.

POINT I

Petitioner's conviction under RICO and the subsequently ordered forfeiture of seven legitimate business organizations may not be sustained because the District Court permitted the jury to find that all seven entities were parts of a single enterprise if it found that petitioner owned them all, and because the indictment was duplicitous.

Joining together seven business corporations, subsidiary corporations, and operating subdivisions of these concerns in a single RICO count, as a single RICO "enterprise" the government alleged below that the defendant had participated in the affairs of the "enterprise" thus identified through a pattern of racketeering activity, consisting of his involvement in a scheme to defraud various hospitals in the New York metropolitan area through the submission of inflated invoices for services performed and goods delivered and demands for payment for freight charges not actually incurred.* It was incumbent upon the govern-

* Whether the indictment alleged the existence of a single enterprise and thus a single offense, or rather represented the

(footnote continued on following page)

ment, therefore, to establish through competent evidence some singularity of purpose or objective in the operation of these seven entities as a whole in order to justfiably regard them as a single RICO enterprise. "[G]roups" as the Sixth Circuit Court of Appeals only recently observed in *United States* v. *Sutton, supra,* at 265, "do not become 'enterprises' except in relation to something they *do*." That is, the existence of some activity or project is what *defines* a group *as* an enterprise. It follows from this that the existence of some shared external characteristic by each alleged constituent of a putative enterprise—such as, for example, their common ownership by a single individual—does not, without more, define the group as an enterprise any more than the common membership in a given community or the common residence of a group of natural persons, without more, would create an enterprise within the meaning of RICO.

It was necessary, therefore, in the instant case, for the government to establish and the jury to find, upon appropriate instructions from the trial court, an associational nexus among the seven entities named in the indictment going beyond their mere status as parts of a corporate hierarchy controlled by the defendant in order to justify

(footnote continued from preceding page)

joinder of several enterprises together and thus the allegation of seven different offenses in a single count was a source of serious dispute at trial and on appeal. The charging language in the indictment itself ambiguously alternated between singular and plural formulations of the term, and added to confusion by alleging that the "enterprise" consisted of the seven named entities which, in turn, were described as "corporations, associations, and other legal entities," and thus, as "enterprises" in and of themselves, in language which precisely tracks 18 U.S.C. § 1961(4). Although acknowledging that the government "might be faulted for imprecise language on occasion," *United States* v. *Huber, supra,* 603 F.2d at 394, the Court of Appeals nevertheless concluded that it was "clear" that the indictment alleged the existence of a single enterprise, and thus, presumably, a single offense.

conviction—and the forfeiture of rights and interest which follows necessarily upon conviction under 18 U.S.C. § 1963(a).

The Second Circuit, however, without any analytical amplification, reached a contrary conclusion. Rather than require the Government to demonstrate the existence of a common set of affairs to the seven entities named in the indictment, the Court ruled that it was sufficient for the Government to show that the affairs of *each* legal entity named as part of the "single" RICO enterprise was conducted through "a pattern of racketeering activity." But having previously concluded that a single RICO offense had been alleged in the indictment the Court created a legal and logical impossibility; the matter may not be had both ways. If the indictment alleged a single enterprise, and thus a single offense, as the Second Circuit held, the Government's evidentiary burden was necessarily to show the existence of a common set of affairs galvanizing the seven named entities into a single unit, whose affairs, in turn, were conducted in the relevant unlawful way. If, on the other hand, the Government was only bound to show as the Second Circuit also held, a connection between each entity and the acts of racketeering, the indictment was fatally duplicitous, charging seven different offenses committed in connection with the affairs of seven different enterprises.*

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* The Court of Appeals viewed the issue of duplicity as one which may have been waived. *United States* v. *Huber, supra,* 603 F.2d at 394, because it was not asserted until the close of the Government's case, as part of a motion for a judgment of acquittal under Rule 29 of the Federal Rules of Criminal Procedure. But a finding of waiver, under the circumstances of this case, is totally insupportable. Because the structure and language of the indictment appeared to allege a single offense, the defendant had a right to assume that the Government would pursue a "single enterprise" theory of the case, based upon proof that all seven entities were united through pursuit of a group of activities or

(footnote continued on following page)

In charging the jury, however, the District Court required *neither* proof of a common set of affairs, *nor* a demonstrable connection between each of the seven named legal entities and the acts of racketeering charged in the indictment. Instead, the District Court charted a different course, and charged the jury that it could find that the seven entities named in the indictment constituted a single enterprise if it found that the defendant merely *owned* them all. The trial court told the jury, in relevant part:

> The indictment charges and you must find beyond a reasonable doubt that the defendant was employed by or associated with an enterprise, to wit: Tudor Inc., Boden Inc., Atlantic Medical Corporation, Hospital Equipment Company, Debs Hospital Supplies, Inc., Medical Facilities, Hospital Furniture/Medical Facilities.
>
> *You are instructed* that if you find the defendant *owned* one or more of the aforesaid corporations, subsidiary corporations, or corporate divisions (hereinafter referred to as corporations) through ownership directly or indirectly, of a majority of stock of such corporations, then you may find that *such corporations so owned* were associated in fact so as to constitute an 'enterprise' within the meaning of the statute.
>
> Next, with respect to this count, you must also find beyond a reasonable doubt that the defendant committed two or more of the offenses alleged in counts

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affairs in which the defendant participated through the relevant racketeering offenses elsewhere charged in the indictment. Counsel's duty to raise the issue of duplicity by way of a pretrial motion under Rule 12 of the Federal Rules of Criminal Procedure assumes that the issue is apparent on the face of the pleadings; it does not require counsel to possess clairvoyant powers or to assume that the Government will pursue a theory of the case radically at variance with the single offense apparently charged in the indictment.

25, 26, and 28 through 33 [charging mail fraud] while, and as a part of, his conducting or participating, either directly or indirectly, in the conduct of the affairs of the enterprise.

In this regard it is not necessary for the government to prove that the affairs of the enterprise were advanced by the defendant's activities, although you may find this to be true, or that the particular enterprise was corrupt, or that the enterprise authorized the defendant to commit, or cause to be committed, the particular acts of racketeering activity—that is the two or more acts of mail fraud.

It is only necessary to find once you reach this element of the count, that the acts of mail fraud were committed by the defendant, or caused to be committed by him in the conduct of the affairs of the enterprise.*

Thus, it was not necessary, under the District Court's instructions, for the jury to find that the organizational association of the seven entities together was in some way or other connected to the perpetration of the acts of mail fraud charged in the indictment, as the Sixth Circuit has found the statute requires, nor was it even necessary for the jury to find that the defendant had participated in the affairs of *each one* of the seven entities through the unlawful acts of racketeering alleged, as the Second Circuit later viewed the matter. Instead, it was sufficient to find that an "association in fact" existed by virtue of the defendant's common ownership of the seven entities, without regard to any connection between each of the seven entities and the wrongful acts alleged, or any common or unifying purpose in the organization of the seven entities or any set of activities or affairs defining the group of seven as

* Transcript of proceedings below at 6287-88; Appellant's Appendix on Appeal at A165-A166. (Emphasis added.)

an enterprise, which activities or affairs, in turn, were corrupted by the commission of the crimes of mail fraud charged in the indictment.

Accordingly, the subsequently returned general verdict of guilty on this count of the indictment, and the special verdict which found that each of the seven named legal entities was a constituent of the enterprise was tainted by fatal ambiguity.* Because the District Court permitted the jury to predicate the finding of "enterprise" merely upon the defendant's common ownership of the seven named business organizations, it could not be known from the verdict whether the jury was persuaded beyond a reasonable doubt of the defendant's implication of the affairs of each of these entities in the acts of racketeering charged in the indictment. The jury could well have concluded, based upon the evidence, that although the defendant owned all seven of the organizations named, his participation in the affairs of the "enterprise" through racketeering activity was limited to his conduct of the frontline medical companies through acts of mail fraud. But because of the way in which the matter was structured for them by the trial court, the jury was necessarily bound to find that all seven entities were members of the enterprise because the defendant *owned them all* and, having found that the defendant's participation in racketeering activity occurred "in the course of his conduct of the affairs of" only some of the entities but not others, the jury could not have expressed such a conclusion of the evidence except through a verdict of guilty.

On appeal to the Court of Appeals for the Second Circuit, Petitioner vigorously argued that, contrary to the

* In addition to its general verdict on the count, the jury was required to return a special verdict identifying members of the enterprise and the extent of the defendant's ownership interest in each member of the enterprise pursuant to Rule 31 of the Federal Rules of Criminal Procedure.

District Court's instruction, his mere ownership of the seven business organizations named in the indictment was not a sufficient predicate on which the jury could find that each of the seven named entities was a part of a single enterprise. The Government ultimately conceded the point as a general proposition, but argued mysteriously that common ownership was the proper standard on the "facts" of this case. In the end, the Court of Appeals rejected the Government's position, and agreed that ownership was not a proper associational circumstance upon which the jury could find the existence of the single enterprise charged in the indictment.

Nevertheless, the Second Circuit affirmed Petitioner's conviction concluding that:

> So long as the jury is correctly apprised of the elements of a RICO violation and is instructed that it may find an entity owned by a defendant to be part of the enterprise *only if the evidence warrants,* then there is no error. We do not believe [the District Court's] charge authorized the jury to include entities in the enterprise merely because they were owned by appellant [Petitioner]. Reading the charge as a whole, we think that the jury understood that it could not include a particular entity in the enterprise unless its affairs were found to have been conducted through the pattern of racketeering activity. *United States* v. *Huber, supra,* 603 F.2d at 394-95. (emphasis added)

But this assessment of the state of the record and the requirements of the statute is both factually and legally erroneous. Factually, contrary to the Second Circuit's view of the record, the District Court did not charge the jury that ownership was an insufficient predicate upon which to base a conclusion of "enterprise"; indeed, as the foregoing reference to the text of the trial court's charge

makes abundantly clear, the District Court did precisely the opposite.* Legally, even accepting as accurate the Second Circuit's reconstruction of the record so as to include events which did not happen, and exclude those which did, the Court's analysis of the Government's burden of proof is at odds with the statute itself. For as we have already observed, RICO "enterprises" may not be forged out of combinations of individuals or corporate bodies except in relation to some common project, activity or set of affairs which makes it possible to refer to the group as a single enterprise. The Second Circuit's failure to require the Government to establish any singularity of purpose or activity permits the Government to join as many violations of the RICO statute as it may believe to exist in a single count of an indictment and thus deprive the defendant of his right to have a jury separately consider his liability under the statute in terms of each entity so named.

To be emphasized here is the fact that such duplicity cannot be a matter of harmless error. The involvement of different legal entities in racketeering activities entails the forfeiture of very different legal interests. Moreover, in the context of the present case, the seven entities named

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* That the jury plainly received the erroneous message that the defendant's ownership of each of the seven entities was a sufficient basis upon which to include each of them in the enterprise emerges most clearly from its subsequent request for further information from the District Court. On the second day of its deliberations, having apparently reached this count of the indictment, the jury submitted a note to the Court which read as follows:

> Exhibits: Certificates of incorporation of Huber Companies listed in count 42.
>
> Testimony of Karl R. Huber and Karl Huber pertaining to ownership of the Huber companies in count 42.
>
> Definition of an enterprise.
>
> Definition of racketeering.

Transcript of proceedings at p. 6353.

were brought into being at different times—indeed, one of them, Boden, Inc. did not exist at all, and therefore had no affairs at all, until 1975, well after the last fraudulent act had been committed. Necessarily, therefore, different constellations of fact were necessary to establish the relevant degree of connection between the affairs of each entity and the acts of mail fraud charged in the indictment as a "pattern of racketeering activity."

The very vice of duplicity is the generation of ambiguous general verdicts which fail to make clear which one or more of the offenses charged in the single count were committed by the defendant. The vice may be harmless where the penal consequences are not different, as for example, where more than one mailing, and thus more than one act of mail fraud is charged in a single mail fraud count. But the vice of duplicity is irretrievably prejudicial in a case such as the present one, where separate violations of the statute may be differentiated according to the identity of the legal entities whose affairs are claimed to be involved in racketeering activity and thus differentiated according to the very different legal interests exposed to forfeiture in the event of conviction.

Accordingly, as a result of the District Court's erroneous charge to the jury, and the Court of Appeals' erroneous analysis of both the record and the evidentiary requirements of the statute, the defendant has been forced to suffer the forfeiture of substantial business interests upon the most ambiguous of verdicts. For these reasons, we respectfully submit, this Court should grant this petition and issue a writ of certiorari to the Court of Appeals for the Second Circuit.

POINT II

Multiple convictions and cumulative punishment under 18 U.S.C. § 1001 may not be obtained where the same false statement is reiterated on more than one occasion.

Each of the six hospitals named in the indictment filed Medicare-Medicaid Cost Reports for the years 1974, 1975, and 1976 in which depreciation was asserted with respect to capital assets and equipment purchased from the medical companies in this case.* Even assuming that the amounts reported for depreciation were "false" and that the act of reporting them was within the ambit of the defendant's criminal purpose, it nevertheless follows, however, that, at most, only one offense was committed with respect to each hospital, not three—or, in one case, four—as alleged in the indictment.

The essence of the offense committed by the Petitioner with respect to these counts was in setting in motion a chain of events which lead, ineluctably, to an overstatement of depreciation on capital assets in annual Medicare and Medicaid Cost Reports by the various hospitals with which companies owned by the defendant had done business. In each year for which a Cost Report was filed, the same assets were depreciated in an equal prorated amount using the straight line method of depreciation. Thus, each succeeding year's Cost Report, for each hospital, contained nothing more than a reproduction of the amount of depreciation claimed for the preceding year for each asset as to which depreciation had been claimed in the preceding year. Thus the government trifurcated each offense, multiplying by a factor of three the defendant's exposure to conviction

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* In the case of Greater Paterson Hospital, a Cost Report covering the second half of 1973 was included in the indictment.

and punishment.* But one offense does not become three at the whim of the government, and the making of *a* false statement is a single offense regardless of how many times the *same* statement may be reproduced or replicated.

In *Bramblett* v. *United States,* 231 F.2d 489 (D.C. Cir. 1956), the defendant was convicted on seven counts of having violated 18 U.S.C. § 1001. The evidence showed that the defendant, then a member of Congress, had contrived a scheme to defraud the United States by falsely representing, in compensation claims submitted on a monthly basis, that a certain individual was a clerk for him and entitled to receive compensation when, in truth and in fact, the defendant converted and intended to convert to his own use the compensation thus authorized. Like the present case, each count of the indictment represented a different and succeeding month in which forms designating the individual as a clerk were submitted to the relevant agency. The Court ruled, however, that only one offense was committed.

It is true that, in *Bramblett,* the defendant was charged with having engaged in a scheme to conceal a material fact under Section 1001, rather than with having made a false statement under the same statute, as in the present case. Nevertheless, although each of these disjunctive sub-divisions of § 1001 is a distinct offense, the essence of the wrong in both cases is in the *act* of concealment or the *act* of making a false representation, as the case may be, and the "scheme to conceal" in the case of prosecutions for concealment or covering up a material fact refers merely to the means by which the offense is perpetrated. "It is the knowing falsity of the statement which is the material part of the statutory crime, not [the scheme to conceal which is] the vehicle of its perpetration." *United*

* Indeed, in this case, cumulative fines of $5,000 on each count were imposed on all of the 19 convictions under § 1001, for a total of $95,000 in fines.

States v. *Uram,* 148 F.2d 187, 190 (2d Cir. 1945). And *Bramblett* has not been construed, in subsequent decisions, to be to the contrary. *Compare, United States* v. *Matanky,* 482 F.2d 1319, 1322 (9th Cir. 1973).

Relying upon *United States* v. *Bettenhausen,* 499 F.2d 1223 (10th Cir. 1974), however, the Second Circuit ruled that Petitioner was properly convicted of 19 counts of having made a false statement. But the Second Circuit's reliance upon *Bettenhausen* was misplaced, and, in any case, the subdivision of the defendant's activities into 19 false statement counts is totally at odds with this Court's clear and unwavering commitment to the principle that a single transaction may not be subdivided into a multitude of discrete offenses.

Bettenhausen involved the submission of false documentation in support of a single tax return. The defendant had argued that because all of the documents were submitted on the single occasion only one false statement count would lie. But the *Bettenhausen* court rejected this contention, observing that the defendant was not charged with having made "fraudulent statements or representations," under § 1001, but rather under that clause of the statute expressed in singular terms—"any false writing or document . . ." Thus the Court ruled, "We feel that the statute aims at the making or using of each 'false writing or document' and intends the wrong connected with each to be a separate offense." *United States* v. *Bettenhausen, supra,* at 1234.

In *Bettenhausen,* however, each false document related to a separate and unrelated transaction, although all were submitted in support of a single fraudulent tax return at one time. Here, in complete contrast, each Cost Report submitted was *identical* in all relevant respects to every other Cost Report submitted by that hospital, and all of them related to a single series of transactions with companies owned and controlled by Petitioner.

In any case, however, the thrust of the Second Circuit's determination in this case runs across the grain of that line of decisions in this Court holding that "doubt will be resolved against turning a single transaction into multiple offenses." *Bell* v. *United States,* 349 U.S. 81, 84 (1955); *Ladner* v. *United States,* 358 U.S. 169 (1958); *see also Simpson* v. *United States,* 435 U.S. 6 (1978); *Jeffers* v. *United States,* 432 U.S. 137, 155 (1977). Here, the Petitioner's crime lay in his causing the various hospitals to overstate their respective claims for depreciation; surely his liability for that wrong may not be enhanced by virtue of the fortuitous circumstance that claims for depreciation are, in fact, amortized over the useful life of the relevant asset, so that his liability is multiplied by the number of years of useful life of the assets sold. At most, Petitioner caused the making of six false statements, representing the inflated depreciation claims by each of the six hospitals for assets purchased from companies owned or controlled by Petitioner, and the matter should not be parsed so fine as to justify the multiplication of his liability for each year in which the *same* statement is repeated. At the very least, there must exist some doubt on this score; as even the Second Circuit observed the matter was not "free from difficulty." *United States* v. *Huber, supra,* at 399. Such doubt may not be resolved in favor of the visitation of cumulative sanctions upon the Petitioner, and accordingly, his convictions should be reversed and the matter remanded for appropriate further proceedings.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: New York, New York
December 10, 1979

Respectfully submitted,

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Appendix A, Opinion of United States Court of Appeals for the Second Circuit.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1202—August Term, 1978.

(Argued June 21, 1979 Decided July 20, 1979.)

Docket No. 79-1132

UNITED STATES OF AMERICA,

Appellee,

—against—

KARL R. HUBER,

Defendant-Appellant.

Before:

WATERMAN, FEINBERG and TIMBERS,

Circuit Judges.

Appeal from judgment of conviction following jury trial before Charles H. Tenney, J. in the United States District Court for the Southern District of New York for conspiracy in violation of 18 U.S.C. § 371, causing to be made false and fraudulent statements to the United States Department of Health, Education and Welfare in violation of 18 U.S.C. §§ 1001, 2, mail fraud in violation of 18 U.S.C. §§ 1341, 2, making false declarations before a grand

jury in violation of 18 U.S.C. § 1623, and conducting the affairs of an enterprise through a pattern of racketeering activity in violation of 18 U.S.C. §§ 1961, 1962(c), 1963, 2.

Affirmed.

JEFFREY D. ULLMAN, New York, N.Y. (Bohrer, Ullman & Taikeff, New York, N.Y., Barry A. Bohrer, of Counsel), *for Defendant-Appellant.*

GEORGE E. WILSON, Assistant United States Attorney, New York, N.Y. (Robert B. Fiske, Jr., United States Attorney for the Southern District of New York, Howard W. Goldstein, Assistant United States Attorney, of Counsel), *for Appellee.*

FEINBERG, *Circuit Judge:*

Karl R. Huber appeals from a judgment of conviction following a lengthy jury trial on a multi-count indictment before Judge Charles H. Tenney in the United States District Court for the Southern District of New York. Appellant was charged in Count One with conspiring, among other things, to defraud the United States in connection with its administration of the Medicaid, Medicare and Hill-Burton programs, to make and cause to be made false statements to a government agency in a matter within its jurisdiction, and to use the mails in furtherance of a scheme to defraud in violation of 18

U.S.C. § 371. Counts Two through 24 charged appellant with making, and causing to be made, false, fictitious and fraudulent statements to the United States Department of Health, Education and Welfare in violation of 18 U.S.C. §§ 1001, 2. Counts 25-33 charged using the mails in furtherance of a scheme to defraud certain insurance companies, hospitals, the United States, and the States of New York and New Jersey in violation of 18 U.S.C. §§ 1341, 2. In addition, appellant was charged with six counts of transporting stolen money in interstate commerce, in violation of 18 U.S.C. §§ 2314, 2 (Counts 34-39), one count of making false material declarations before a grand jury in violation of 18 U.S.C. § 1623 (Count 40), and one count of conducting the affairs of an enterprise through a pattern of racketeering activity in violation of 18 U.S.C. §§ 1961, 1962(c), 1963, 2 (Count 42).[1]

During the course of the trial, the district court entered judgments of acquittal on Counts 14-16, 20, 27, and 34-39. The jury convicted appellant on all of the remaining counts, and returned a special verdict in which it found that the enterprise concerned in Count 42 consisted of the following entities also found to be wholly owned by appellant: Tudor, Inc. (Tudor), Boden, Inc. (Boden), Atlantic Medical Corporation (Atlantic), Hospital Equipment Company

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1 Also charged, in Counts One to 39 and 42 were Huber's father, Karl Huber, Peter M. Conroy and Anthony W. Eckert, Jr. Appellant's father was also charged in Count 41 with making false material declarations before a grand jury, in violation of 18 U.S.C. § 1623. His trial was severed because of ill health. Conroy and Eckert pleaded guilty prior to trial to the conspiracy count, four false statement counts, and four mail fraud counts, and each was sentenced to six months' imprisonment, three years' probation, and a $25,000 fine.

Appendix A.

(HEC), Debs Hospital Supplies, Inc. (Debs), Medical Facilities, and Hospital Furniture/Medical Facilities (HF/MF). Judge Tenney sentenced appellant to a three-year prison term on the conspiracy and false statement counts and a two-year term on the mail fraud counts to run concurrently with each other, and to a one-year term on the perjury count to be consecutive to the other prison terms, a total of four consecutive years. Appellant was fined $5,000 on the conspiracy count and on each of the false statement counts, and $1,000 on each of the mail fraud counts, a total of $108,000. The judge directed conditional forfeiture of appellant's enterprise in accordance with the special verdict on the racketeering count. The condition gave appellant the option to redeem his corporations by payment within six months of cash or other property satisfactory to the Attorney General having a value of $100,000. Appellant was also required to bear the costs of prosecution, which amounted to $19,412.72. He remains free on $50,000 bail pending appeal.

Appellant makes numerous arguments to us, variously seeking either a new trial or the striking of some of the counts and a resentencing. For the reasons set forth below, we affirm the judgment of conviction in all respects.

I

A number of appellant's arguments concern the legal sufficiency of the evidence. At this juncture, we briefly summarize the activities for which appellant was convicted viewing the evidence most favorably to the government. Detailed review of the evidence will be added later where necessary.

Appendix A.

Appellant Karl R. Huber, an honors graduate of Princeton University, a 1965 graduate of Harvard Law School and a member of the New Jersey bar, joined his father, Karl Huber, in the latter's allegedly troubled business ventures instead of working for a law firm in Newark as planned. In October 1971, appellant and his father obtained control of HEC, an established New Jersey hospital supply house. HEC, through its contract division, Medical Facilities, and a series of corporate successors, entered into a number of cost-plus contracts with hospitals in New York and New Jersey for the sale of hospital and surgical supplies, furniture and equipment. The price consisted of the manufacturers' invoiced costs to HEC plus a specified mark-up (usually between five and eight percent) and the net cost of any freight. The evidence showed that the Hubers knew about and understood the nature of the cost-plus contracts from the time they took over HEC, were involved in and managed the hospital supply business on a day-to-day basis, and were kept apprised in detail about new contracts as they were made.

Shortly after the Hubers acquired HEC, and at their specific direction, HEC employees Conroy and Eckert, see note 1 supra, began to inflate the manufacturers' costs quoted to the hospitals. At appellant's suggestion, invoices were falsified where necessary. The hospitals were also charged for freight not actually incurred. The term "phantom freight," apparently coined by appellant's father, was in general usage at the office. As a result of these fraudulent practices, HEC and Medical Facilities received an effective mark-up of roughly between 18 percent and 29 percent rather than the five to eight percent

specified in the contracts. There was evidence that the mails were used in connection with the scheme to defraud the hospitals. The fraudulent overcharges totalled nearly $471,000, most of which was subject to reimbursement by either the federal or state government.[2] Further, each hospital capitalized the costs incurred in outfitting it, and a depreciation expense was annually claimed as part of each hospital's operating expenses. These expenses were reported to insurance companies, which served as fiscal intermediaries for the Medicare and Medicaid Programs. The cost reports formed the basis for reimbursement by the federal and state governments, and the fraud resulted in inflated depreciation claims of nearly $105,000. The nature of the federal and state hospital funding programs was made clear to the Hubers from the outset of their involvement in the hospital supply operation, and they understood that those programs would stimulate hospital expansion.

In July 1977, appellant appeared before a grand jury that was investigating whether fraud had been committed by HEC or its successors. Appellant denied to the grand jury that he exercised close control over the hospital business and that he knew of the cost-plus nature of the contracts or the meaning of the term "phantom freight." The proof at trial overwhelmingly showed otherwise.

In defense, appellant contended that he and his father had been cheated by Conroy and Eckert and

2 The federal government would reimburse the hospitals through the United States Public Health Service under the Hill-Burton Act, 42 U.S.C. § 291 et seq. State reimbursement would be by the New York Department of Health under N.Y. Pub. Health Law, Arts. 28-A and 28-B (McKinney 1977), the Nursing Home Companies Law and the Hospital Mortgage Loan Construction Law, respectively.

that if appellant was directly involved in the fraudulent scheme, because of the peculiar relationship between him and his domineering father, appellant lacked the independence of will necessary to form the intent needed to sustain the convictions. Numerous witnesses, expert and otherwise, testified on this latter point. Appellant also testified in his own defense.

II

Appellant makes several challenges to his conviction on Count 42 of the indictment, which charged that he conducted the affairs of an enterprise through a pattern of racketeering activity in violation of 18 U.S.C. § 1962(c), and which resulted in the forfeiture of the enterprise pursuant to 18 U.S.C. § 1963. Those provisions are part of Title IX of the Organized Crime Control Act of 1970 (Act), Pub. L. No. 91-452, 84 Stat. 922, reprinted in [1970] U.S. Code Cong. & Ad. News 1073, which was enacted in response to what Congress perceived as the threat to the American economy from the unchecked growth of organized crime. United States v. Parness, 503 F.2d 430, 439 (2d Cir. 1974), cert. denied, 419 U.S. 1105 (1975). The Act was intended in part to remedy

> defects in the evidence-gathering process of the law inhibiting the development of the legally admissible evidence necessary to bring criminal and other sanctions or remedies to bear on the unlawful activities of those engaged in organized crime and because the sanctions and remedies

available to the Government are unnecessarily limited in scope and impact.[3]

Title IX of the Act added a new Chapter 96 to Title 18 of the United States Code, entitled "Racketeer Influenced and Corrupt Organizations" (RICO). The purpose of RICO is to enable law enforcement authorities not only to punish individual criminals, but to separate the corrupt interstate enterprises in which they were involved from their criminal organizations so that prosecutions will do more than merely impose a "compulsory retirement and promotion system as new people step forward to take the place of those convicted." S. Rep. 91-617, 91st Cong., 1st Sess. 78 (1969) (Senate Report). Thus, in order to "deal not only with individuals, but also with the economic base through which those individuals constitute such a serious threat to the economic well-being of the Nation," id. at 79, RICO, in 18 U.S.C. § 1963, imposes the sanction of forfeiture of an "enterprise" involved in violations of 18 U.S.C. § 1962.

That section specifies the kinds of corrupt infiltration into interstate commerce that Congress sought to prevent. The section provides:

> (a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indi-

3 The quotation is from the Act's statement of findings and purpose, reprinted in [1970] U.S. Code Cong. & Ad. News at 1073.

> rectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce . . . .
>
> (b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.
>
> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.
>
> (d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

A "pattern of racketeering activity" is defined in 18 U.S.C. § 1961(5) as consisting of at least two acts of racketeering activity within ten years of one another. "Racketeering activity" is defined in 18 U.S.C. § 1961(1) as any of a wide variety of serious criminal acts under state and federal law, including mail fraud in violation of 18 U.S.C. § 1341, which was the racketeering activity charged in the indictment

here.[4] Since appellant was charged with a violation of section 1962(c), the government had to show that appellant had committed at least two acts of mail fraud within ten years of one another in the conduct of the affairs of an enterprise in interstate commerce with which he was associated.

Pointing to what he claims are inconsistent judicial interpretations of RICO, appellant urges this court to reconsider its holding that RICO is not unconstitutionally vague. See United States v. Parness, supra, 503 F.2d at 440-42. We decline the invitation, noting that each circuit court faced with the issue has reached the same result. See United States v. Hawes, 529 F.2d 472, 479 (5th Cir. 1976); United States v. Campanale, 518 F.2d 352, 364 (9th Cir. 1975), cert. denied, 423 U.S. 1050 (1976); United States v. Cappetto, 502 F.2d 1351, 1357-58 (7th Cir. 1974), cert. denied, 420 U.S. 925 (1975). See also Atkinson, Criminal Law, "Racketeer Influenced and Corrupt Organizations," 18 U.S.C. §§ 1961-68: Broadest of the Federal Criminal Statutes, 69 J. Crim. Law 1, 4 n.26 (1978).

In a number of loosely related arguments concerning the composition to the enterprise to be forfeited, appellant claims that a group of corporations cannot be an "enterprise" within the meaning of RICO, that the government's theory of the composition of the enterprise varied in the indictment and at trial, that the indictment was duplicitous in the RICO count, that the judge's charge concerning the degree of connection that the government had to show between

4 The indictment also charged transportation of stolen money in interstate commerce, in violation of 18 U.S.C. § 2314, as part of the racketeering activity. The substantive charges of 18 U.S.C. § 2314 violations, Counts 34-39, were not submitted to the jury.

each corporation and appellant's racketeering activity was erroneous, that the evidence was insufficient to support the inclusion of certain of the corporations in the enterprise, and that the use of a special verdict to determine the composition of the enterprise was error, prejudiced the defense, and in any event did not cure any of the other problems just itemized.

Appellant's argument that a group of corporations cannot be an enterprise within the meaning of the statute stems from an overly rigid reading of the definitions contained in section 1961. Subsection (4) provides

> "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.

The argument runs that since the term "corporation" is in the singular, the only way a group of corporations may be an "enterprise" within the meaning of the statute is if they come within the language, "group of individuals associated in fact." And since "person" is defined in subsection (3) as including "any individual or entity . . . ," it must be that the term, "individual," since used in the disjunctive with "entity," cannot encompass an entity such as a corporation. Therefore a group of corporations cannot be a "group of individuals associated in fact" within the meaning of the definition of "enterprise." But this makes nonsense of the statute. First, the language does not require that result. The definition of "enterprise" is a list beginning with the word "includes." This indicates that the list is not exhaustive but merely illustrative. See, e.g., Federal Land Bank of

St. Paul v. Bismarck Lumber Co., 314 U.S. 95, 99-100 (1941). Second, at least where the enterprise is commercial, courts have consistently construed "enterprise" broadly in light of Congress' mandate that the provisions of Title IX of the Act "shall be liberally construed to effectuate its remedial purposes," Act § 904(a), [1970] U.S. Code Cong. & Ad. News at 1104. See, e.g., United States v. Altese, 542 F.2d 104, 106 (2d Cir. 1976), cert. denied, 429 U.S. 1039 (1977); United States v. Parness, supra, 503 F.2d at 439. Congress was concerned about the impact on the American economy of the infiltration of organized crime into interstate commerce. There is no reason to believe that Congress cared what form such infiltration took, except to indicate by an abundance of caution in listing the examples in the definition of enterprise that all such harmful infiltration, regardless of form, should be eradicated. To view "enterprise" as excluding groups of corporations would make it too easy to avoid RICO's forfeiture sanction. One could simply transfer assets from the corporation whose affairs had been conducted through a pattern of racketeering activity to another corporation whose affairs had up to that point not been so conducted. We agree with the government that appellant's reading of the statute would perversely insulate the most sophisticated racketeering combinations from RICO's sanctions, the precise opposite of Congress' intentions.

Appellant claims that the government's theory of the case never crystallized, that it never decided whether the prosecution was based on a single enterprise composed of one or more of the seven entities listed in the indictment, or a seven-enterprise theory.

We disagree. Although there were occasions when the word "enterprises" was used in the indictment and during the trial, it seems clear that it was used as a synonym for "entities" rather than in the technical sense of a RICO enterprise. While the government might be faulted for imprecise language on occasion, it is clear that the indictment was predicated on a one-enterprise theory, and that that was the basis on which proof was offered and on which the jury was charged.

Appellant also claims that the indictment was duplicitous in that Count 42, the RICO count, charged a series of acts through a number of entities, and that the jury was therefore not required to agree unanimously on any particular fact to reach a guilty verdict. Appellant's failure to raise this claim prior to trial "may be deemed" a waiver. Fed.R.Crim.P. 12(b)(2); United States v. Kelley, 395 F.2d 727, 729 (2d Cir.), cert. denied, 393 U.S. 963 (1968). Further, the convictions on all the mail fraud counts submitted to the jury coupled with the special verdict specifying that all the entities were members of the enterprise show that the jury was obviously not divided on the theory underlying its verdict of guilt.

Appellant argues that Judge Tenney's charge permitted the jury to find that the various entities were part of the enterprise if it found that defendant owned them all even if he conducted the affairs of only one of them through a pattern of racketeering activity. The government properly concedes that such a connection alone would not support application of RICO's forfeiture sanction to enterprises whose affairs were not conducted through a pattern of racketeering activity. However, so long as the jury is cor-

rectly apprised of the elements of a RICO violation and is instructed that it may find an entity owned by a defendant to be part of the enterprise only if the evidence warrants, then there is no error. We do not believe Judge Tenney's charge authorized the jury to include entities in the enterprise merely because they were owned by appellant. Reading the charge as a whole, we think the jury understood that it could not include a particular entity in the enterprise unless its affairs were found to have been conducted through the pattern of racketeering activity.

Appellant contends that, even if the jury was properly instructed, the evidence was insufficient to link a number of the enterprises to the pattern of racketeering activity. The evidence at trial, however, viewed most favorably to the government, established that Tudor, Boden, Atlantic, HEC, Debs, Medical Facilities and HF/MF were involved in the racketeering activity as follows. First, appellant virtually concedes that the evidence was sufficient to show that the affairs of Medical Facilities and HF/MF were conducted through a pattern of racketeering activity. The focus of the argument is really on the five other entities. Medical Facilities was the contract division of HEC when the Hubers acquired HEC in October 1971 through Tudor, a Huber controlled corporation. In 1972, HEC became the wholly owned subsidiary of Atlantic, another corporation controlled by the Hubers. During the operation of the fraud, checks totalling $871,000 were drawn on HEC by the Hubers in favor of Independent Management Company (IMC), a division of Tudor. This was during a period when Huber made large transfers of funds among various company checking accounts. The jury could infer that

checks drawn on HEC to IMC represented funds derived from the scheme to defraud the hospitals on the cost-plus contracts serviced by Medical Facilities. In 1973, Tudor acquired Debs. Huber then had Tudor trade its Debs stock for Atlantic's HEC stock. In 1973, HEC was wound down, and its business was transferred to Debs. Debs's name was pasted over HEC's name on the invoices. HF/MF was then formed and became the successor to the hospital design and interior business of HEC and Debs. The latter ceased operations in March 1974, and HF/MF ceased in May 1975. Shortly before this last event, Huber shifted to Boden all of Tudor's assets, subject to its liabilities. Thus, these companies were not merely unrelated businesses owned by the same person. They were all involved in the hospital supply operation, which could be fairly characterized as a single business operated under various names and forms chosen by appellant to suit his own purposes and convenience.

Appellant relies heavily on United States v. Nerone, 563 F.2d 836 (7th Cir. 1977), cert. denied, 435 U.S. 951 (1978), in arguing that not all of the seven entities were conducted "though a pattern of racketeering activity." There, the Seventh Circuit reversed a RICO conviction where the defendants had been charged with conducting the affairs of Mapel Manor, Inc., a trailer park corporation, through a pattern of racketeering activity. The defendants apparently conducted an illegal gambling operation in one of the mobile homes at their trailer park. But the gambling operation had nothing to do with the affairs of the trailer park. There was no "endeavor to show that gambling revenues were used by or in any

way channeled into the corporation or that persons were paid out of gambling revenues to perform services for Mapel Manor, Inc." Id. at 851. Thus, the government's RICO case failed there "because of a total want of proof of the connection between the racketeering activities and the affairs of Maple Manor, Inc." Id. at 852. Moreover, the trailer park was not in the gambling business. In contrast to that case, the seven entities here were all in the hospital supply business, and that business was conducted through a series of mail frauds.

We thus find there was sufficient evidence to sustain the charge that the affairs of the seven entities were conducted by appellant though a pattern of racketeering activity. We note, however, that the potentially broad reach of RICO poses a danger of abuse where a prosecutor attempts to apply the statute to situations for which it was not primarily intended. Therefore, we caution against undue prosecutorial zeal in invoking RICO. We also emphasize to the district judges that when RICO is invoked each set of facts must be evaluated independently. We cannot at this point lay down any fixed rules concerning the applicability of the statute. For example, in some cases a pattern of racketeering activity in the conduct of a subsidiary's affairs may not be attributable to the parent. We hold only that on these facts, particularly the evidence of continuous manipulation of the form of the business and the transfer of large sums among the corporations, these entities were sufficiently intertwined in the mail fraud to be deemed part of the RICO enterprise.

Appellant also challenges the use of the special verdict. Fed.R.Crim.P. 31(e) provides:

> Criminal Forfeiture. If the indictment or the information alleges that an interest or property is subject to criminal forfeiture, a special verdict shall be returned as to the extent of the interest or property subject to forfeiture, if any.

This provision, along with Fed.R.Crim.P. 7(c)(2) governing indictments, was specifically added to the rules in 1972 "to provide procedural implementation of the recently enacted criminal forfeiture provision of [RICO]." Notes of Advisory Committee on Rules, Rule 7(c)(2). Appellant claims that the Rule authorizes the use of a special verdict only to the extent necessary to determine a defendant's interest in an enterprise, but not for the purpose of identifying membership in the enterprise. Here the special verdict called for both inquiries. The jury was required to specify which corporations were part of the enterprise and the percentage of appellant's interest in each. Appellant argues that since the former was unauthorized by Rule 31(e), the special verdict runs afoul of the asserted general proposition that special verdicts are anathema to federal criminal procedure. However, we believe this special verdict to be wholly within the confines of Rule 31(e). Given the nature of the enterprise alleged, it was obviously necessary for the jury to say which entities were part of it, as well as appellant's interest in each, in order to determine the "extent of the . . . property subject to forfeiture."

Finally, appellant argues that the forfeiture sanction violates the Eighth Amendment's proscription on cruel and unusual punishments.[5] Judge Tenney re-

5 Both parties incorporated by reference their arguments on this issue in the district court.

jected the contention in a lengthy oral opinion. RICO is apparently the first modern federal statute to impose forfeiture as a criminal sanction directly on an individual defendant. As noted in the Senate Report to RICO,

> While there is some indication that this concept of criminal forfeiture was in usage in the colonies, the First Congress by Act of April 20, 1790, abolished forfeiture of estate and corruption of blood, including in cases of treason. That statute, as revised, is found in 18 U.S.C. § 3563 . . . . From that date to the present, therefore, no Federal statute has provided for a penalty of forfeiture as a punishment for violation of a criminal statute of the United States. Section 1963(a), therefore, would repeal 18 U.S.C. § 3563 by implication.

Senate Report at 80. However, what is innovative about RICO is not that it imposes forfeiture as a consequence of criminal activity, but rather that it imposes it directly on an individual as part of a criminal prosecution rather than in a separate proceeding in rem against the property subject to forfeiture. Statutes providing for in rem forfeiture of property related to criminal activity are relatively common. See, e.g., 49 U.S.C. §§ 781-83 (relating to narcotics violations); Legislative Note, Organized Crime Control Act of 1970, 4 U. Mich. J. of Law Reform 546, 624 & n.13 (1971). Such statutes have been upheld even where, unlike here, the effect is to deprive an owner of property where that owner is not the person guilty of using the property for criminal purposes. See Goldsmith-Grant Co. v. United

States, 254 U.S. 505, 511 (1921) (statute "too firmly fixed in the punitive and remedial jurisprudence of the country to be now displaced"). Further, such "a forfeiture proceeding is quasi-criminal in character. Its object, like a criminal proceeding, is to penalize for the commission of an offense against the law." Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 700 (1965). At least for this purpose, there is no substantial difference between an in rem proceeding and a forfeiture proceeding brought directly against the owner. Cf. Shaffer v. Heitner, 433 U.S. 186 (1977).

We do not say that no forfeiture sanction may ever be so harsh as to violate the Eighth Amendment. But at least where the provision for forfeiture is keyed to the magnitude of a defendant's criminal enterprise, as it is in RICO, the punishment is at least in some rough way proportional to the crime. We further note that where the forfeiture threatens disproportionately to reach untainted property of a defendant, for example, if the criminal and legitimate aspects of the "enterprise" have been commingled over time, section 1963 permits the district court a certain amount of discretion in avoiding draconian (and perhaps potentially unconstitutional) applications of the forfeiture provision. Section 1963(c) provides:

> Upon conviction of a person under this section, the court shall authorize the Attorney General to seize all property or other interest declared forfeited under this section upon such terms and conditions as the court shall deem proper.

In this case, Judge Tenney provided in his sentence that the seizure

> shall be on the following terms and conditions: (1) that defendant may redeem and repossess himself of said entities at any time within six months of the date of this judgment upon payment or delivery to the Attorney General of cash or other property satisfactory to the Attorney General having a value of $100,000 . . . .

We certainly cannot say that the forfeiture provision is unconstitutional as applied to these circumstances, even if there were some doubt about its application to others.

Having determined that appellant's conviction under the RICO count is entirely proper, we turn to the other points raised.

III

Huber raises several points with respect to his false statement convictions under 18 U.S.C. §§ 1001, 2. Section 1001 provides:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more five years, or both.

Section 2 provides:

> (a) Whoever commits an offense against the United States or aides, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

Huber was convicted on 19 counts for having caused six hospitals with which he dealt to submit claims to the government, through fiscal intermediaries, for reimbursement for depreciation costs that were inflated due to fraud. The 19 convictions represented each hospital's annual claims over three, and in one case four, years.

Appellant first argues that the statements made to the government were not literally false, since the figures reported as the basis on which depreciation was calculated reflected the hospitals' actual original (albeit inflated) costs. But the hospitals were required to certify that the claims submitted represented properly reimbursable costs. Appellant bases his argument on regulations applicable to depreciation claims on capital expenditures. 20 C.F.R. § 405.415. Although these regulations were not referred to by the district judge in his charge to the jury,[6] they do not differ on this issue from those to which the judge did refer in his charge. That is, under either set of regulations the government provides reimbursement only to the extent that the expenditures were based on reasonable costs honestly arrived at. Thus, even under the regulations cited to us by appellant, for

6 Appellant did not refer to the depreciation claims regulations either in his written requests to charge or in his exceptions to the charge.

depreciable assets acquired after 1970 as those involved here, allowable depreciation could only be based on "historical cost" to the extent that such cost did not exceed the "lower of current reproduction cost . . . or fair market value at the time of purchase." 20 C.F.R. § 405.415(b)(1). "Fair market value" is defined in the next subsection, (b)(2), as "the price that the asset would bring by bona fide bargaining between well-informed buyers and sellers at the date of acquisition." In this case, there was bona fide bargaining, which produced the cost-plus contracts. The costs relied on by the hospitals in the reports, however, were not the costs that would have been incurred through honest performance of those contracts, but were costs that were inflated by fraud, and to the extent they were so inflated, the claims were not reimbursable. The hospitals' innocent statements that the costs were fully reimbursable were therefore false. On this view, we need not address the government's contention that even if the statements were not literally false, they were "fraudulent" within the meaning of section 1001.

Appellant next argues that the evidence was insufficient as a matter of law to establish that he "willfully cause[d]" the submission of the false statements to the government within the meaning of section 2(b). He argues that his purpose, if any, was only to defraud the hospitals, not the government. Appellant claims that he did not care about the hospitals' cost reports because they "played no role in the amount of money paid by the hospitals to the defendants . . . and even their filing *vel non* was a matter of total irrelevance and indifference to the defendants." Thus, he argues, in the absence of a criminal purpose

or objective to cause a false statement to be made to the government, his convictions cannot stand, citing United States v. Peoni, 100 F.2d 401, 402-03 (2d Cir. 1938) (L. Hand). However, there was sufficient evidence from which the jury could infer that the filing of the false statements *was* a criminal purpose of appellant and that their filing was not a matter of indifference to him. There was plenty of evidence that from the outset Huber was familiar with the government hospital funding programs, which he knew would stimulate hospital activity and encourage expansion. The jury was entitled to infer that such funding, and the paper work that went with it, was essential to the prosperity of appellant's ongoing fraudulent business activities. This was not a one-time fraud that ended prior to the filing of any papers with the government by the hospitals.

Appellant's last objection to his false statement convictions is to the number of them. He was convicted on 19 counts, whereas, he argues, the activities alleged comprised at most six counts, i.e., one count for each of the six hospitals submitting depreciation claims to the government. Appellant's point is that since the historic cost figure reported to the government as the basis for each hospital's annual claim for depreciation was the same each year, there was, in effect, only one false statement for each hospital, which was merely repeated a number of times. In other words, appellant claims the convictions were multiplicitous, in that a single act was alleged to constitute several violations of the same statute. See United States v. Samuel Israelski, 597 F.2d 22, 24-25 (2d Cir. 1979). While such a question

is rarely free from difficulty, we think appellant was correctly convicted on all 19 counts. Appellant was not charged with a given number of fraudulent schemes, but rather with having caused a certain number of false statements to be made. Had a hospital knowingly used an inflated historic cost as the basis for depreciation claims, it would have committed a separate violation with each annual claim. See United States v. Bettenhausen, 499 F.2d 1223, 1234 (10th Cir. 1974). Thus, appellant's convictions for having caused the submission of the 19 statements are affirmed.

Appellant next complains of the district judge's refusal to allow a defense witness to testify as an expert in the field of psychoanalysis, and that such refusal seriously interfered with appellant's ability to present his defense that because of his relationship with his father he was incapable of forming the mental state necessary to sustain the convictions. The witness did testify as a business expert. He is a professor of economics at Harvard Business School. He has also studied psychoanalysis at the Boston Psychoanalytic Institute, and, though he has had no medical training, is certified as a psychoanalyst by the American Psychoanalytic Institute. He has treated people regularly without supervision for a number of years. Judge Tenney heard the proffered testimony in the absence of the jury, and ruled the witness unqualified to testify as an expert concerning appellant's mental state. While we do not say that all of us would have ruled the same way, we hold that the district judge did not abuse his broad discretion in deciding that this witness was not qualified in this case. See, e.g., Hamling v. United States, 418

U.S. 87, 108 (1974); United States v. Bermudez, 526 F.2d 89, 98 (2d Cir. 1975), cert. denied, 425 U.S. 970 (1976). This is particularly so in light of the fact that two psychiatrists did testify as experts concerning appellant's mental state, and thus the defense based on appellant's asserted lack of free will was presented to the jury.

Appellant challenges the sufficiency of the evidence on four of the mail fraud counts. These challenges are aimed at more than simply reversal of those convictions. Relying on a case in the Third Circuit for the proposition, appellant argues that if any of the mail fraud counts are reversed, the RICO count must be reversed as well, because it is impossible to know which mail fraud counts the jury relied on in finding the requisite "pattern of racketeering activity." United States v. Brown, 583 F.2d 659, 669 (3d Cir. 1978). We need not decide whether this circuit would agree with that analysis, cf. United States v. Parness, supra, 503 F.2d at 438 ("Convictions on any two of these [travel fraud] counts were sufficient under § 1961(5) to establish the 'pattern of racketeering activity' necessary for a conviction under § 1962(b)."), because the evidence was sufficient to sustain all the mail fraud counts submitted to the jury.

Appellant argues that as to two of the counts, 25 and 26, there was insufficient evidence of use of the mails. Those counts concerned checks paid by two of the hospitals to Medical Facilities. Officials from both hospitals testified that checks were typically mailed in the ordinary course of business. Although there was testimony that some checks were picked up by hand, they were identified as checks other

than those specified in Counts 25 and 26. Witnesses could not recall whether any checks other than those identified were picked up by hand. This testimony of an alternative mode of delivery is simply too scanty, compare United States v. Baker, 50 F.2d 122, 123 (2d Cir. 1931) (testimony by lawyer that "a great many letters delivered by his office were not mailed"), to prevent the use of customary business practices as proof of mailing. See United States v. Toliver, 541 F.2d 958, 966 (2d Cir. 1976); United States v. Fassoulis, 445 F.2d 13, 17 (2d Cir.), cert. denied, 404 U.S. 858 (1971).

As to Counts 32 and 33, appellant claims that use of the mails by the hospital to deliver monthly payment requisitions to the New York State Department of Health came only after consummation of the fraudulent transactions, and thus could not have been "for the purpose of executing [a] scheme or artifice [to defraud]" within the meaning of 18 U.S.C. § 1341,[7] under United States v. Maze, 414 U.S. 395 (1974). Appellant's point is that all the invoices on which the requisitions were based had already been paid to one of appellant's entities by the hospital before the mailing. However, regardless of whether all

7 In relevant part, 18 U.S.C. § 1341 provides:

Whoever, having devised or intending to devise any scheme or artifice to defraud . . . , for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

of the invoices had already been paid, the mailing to obtain reimbursement was a part of this ongoing scheme to defraud. As stated earlier, the jury could find that government funding of hospital expansion was essential to the prosperity of appellant's fraudulent scheme. In *Maze*, supra, 414 U.S. 395, the defendant stole a credit card and fraudulently used it to obtain food and lodging at motels. The mails were used by the motels to obtain payment on invoices from banks. Maze's "scheme reached fruition when he checked out of the motel, and there is no indication that the success of his scheme depended in any way on which of his victims ultimately bore the loss." Id. at 402. Further, the mailings there "increased the probability that [the] respondent would be detected and apprehended." Id. at 403. Thus, in *Maze*, the mailings were not only not in furtherance of a scheme to defraud, they threatened to thwart it. Here, viewed realistically, the mailings were an integral part of Huber's fraudulent scheme. As stated earlier, the jury could find that the government funding was essential to generate the funds for hospital expansion on which the continuance of the illegal enterprise depended. See generally United States v. Hasenstab, 575 F.2d 1035, 1038-39 (2d Cir. 1978). Therefore, there was sufficient evidence that the mailings were in furtherance of a scheme to defraud.

Finally, appellant argues that his request for an order withdrawing several of the 18 specifications of perjury set forth in Count 40 should have been granted.[8] We have carefully reviewed the objections

8 Appellant was charged with violating 18 U.S.C. § 1623, which provides in relevant part:

(footnote continued on next page)

to each specification and find that the truthfulness of each was a question that was properly submitted to the jury. United States v. Bonacorsa, 528 F.2d 1218 (2d Cir.), cert. denied, 426 U.S. 935 (1976). There was no "fundamental ambiguity or imprecisiness in the questioning," id. at 1221, and we cannot say that any of the answers was literally true on its face.

For the reasons set forth above, we affirm the judgment of conviction is all respects.

(a) Whoever under oath in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration . . . shall be fined not more than $10,000 or imprisoned not more than five years, or both.

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570—7-23-79 • USCA—4391

Appendix B, Order Denying Petition for Rehearing.

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the tenth day of October, one thousand nine hundred and seventy-nine.

Present: HON. STERRY R. WATERMAN,
HON. WILFRED FEINBERG,
HON. WILLIAM H. TIMBERS,

Circuit Judges.

79—1132

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

KARL HUBER,

Defendant-Appellant.

A petition for a rehearing having been filed herein by counsel for the appellant, Karl Huber

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

A. DANIEL FUSARO,
Clerk.

Appendix C, Order Denying Petition for Rehearing in banc.

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the tenth day of October, one thousand nine hundred and seventy-nine.

79-1132

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

KARL R. HUBER,

Defendant-Appellant.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellant, Karl R. Huber, and no active judge who was a member of the panel having requested that a vote be taken on said suggestion

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

IRVING R. KAUFMAN
Chief Judge